IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMM. FOR JUDGMENT NO.668 OF 2003

IN

SUMM.SUIT NO.1552 OF 2003

APW President Systems Limited.... Plaintiff

versus

High Tech Engineering Company.. Defendant

Mr R.C.Desai i.b Mr.V.W.Apte for Plaintiff

Mr.Sunil Patel i/b Mr.Rajesh Desai for Deft.

CORAM : D.G. KARNIK, J

DATED : 20th April 2005.

P.C:-

1. This Summons for Judgment is taken out by the plaintiff in the suit filed by it for recovery of the price of the goods sold, supplied and delivered to the defendant. By filing an affidavit in reply, the defendant resists the claim of the plaintiff and claims an unconditional leave to defend the suit. Learned counsel for the defendant submits that there are two defences available to it. Firstly, he submits

that the goods were defective and therefore the plaintiff is not entitled to recover the price of the goods. Secondly, he submits that there was no written contract to pay interest and therefore the defendant is not liable to pay interest for the value of the goods.

2. There is no dispute between the parties that the plaintiff supplied the goods to the defendant under invoice dated 21st August, 2001 (Exhibit D to the plaint). However, according to the defendant, the goods were defective and the defendant informed to the plaintiff about the defect in the goods. Therefore, the defendant is not liable to pay for the price of the goods. Learned counsel for the plaintiff points out that the defence of the alleged defect in the goods is a moonshine and false and not a defence of substance. In order to avoid the liability to pay the price, the defendant has falsely raised the defence of defect in the goods. According to the learned counsel, when the plaintiff demanded the payment, the defendant falsely started contending that the goods were defective. Therefore, by an advocate’s notice dated 14th July, 2003 the plaintiff called upon the defendant to make the payment or to inform the

plaintiff within a week whereupon the plaintiff would take back the goods. The defendant did not inform the plaintiff to take back the goods within one week. On the other hand by a reply dated 21st February, 2003 the defendant stated that the goods which were supplied by the plaintiff were already used by the defendant in the equipments supplied by the defendant to its clients and therefore it cannot return the goods until as the returning of the goods would cost it money. In my view, this is a clear admission by the defendant that the goods have been appropriated by it to the contract and have been used and consumed by it. In the circumstances, the defence that the goods were defective is a defence of no substance and a moonshine. Despite the plaintiff's offer to take back the goods the defendant failed and neglected to accept the offer and has appropriated the goods towards the contract.

3. As regards the interest the defendant's purchase order did not provide for any interest. According to the plaintiff, the general terms and conditions of the supply which were annexed to the order of acceptance contains a clause of interest. The defendant has denied that the general terms and conditions of sale

were annexed to the purchase order. In the circumstances, the plaintiff would be required to prove that the general terms and conditions were annexed to the order of acceptance and formed part of the contract. The defendant has therefore a reasonable defence regarding the interest and triable issue arises regarding the liability to pay interest. Hence, I pass the following order :

> " The defendant is granted unconditional leave to defend the suit to the extent of Rs.1,00,540/- i.e. the claim of interest. The defendant is granted conditional leave to defend the suit to the extent of Rs. 3,44,382/- i.e. the claim for the principal sum subject to its depositing in court Rs.3,44,000/- within four weeks. On such deposit, the plaintiff would be entitled to withdraw the same by furnishing security to the satisfaction of the Prothonotary and Senior Master. On failure of the plaintiff to furnish the security within four weeks of the deposit and intimation thereof, the amount shall be invested in a nationalised bank of the choice of the defendant if such choice is

indicated at the time of deposit or else in Bank of India, Main Branch, Mumbai, Opposite High Court, initially for 13 months to be renewed for like periods. On deposit of the money, suit shall stand transferred to the list of commercial causes. The defendant to file the written statement within six weeks."

D.G.KARNIK, J